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No. 90-1153

In The

Supreme Court of the United States

October Term, 1990

SKY CHEFS, INC., a Delaware corporation,

Petitioner,

v.

CONNIE DIAS,

Respondent.

Supplemental Brief In Support Of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Sky Chefs, Inc. ("Petitioner" or "Sky Chefs"), pursuant to Sup. Ct. R. 15.7, hereby submits its Supplemental Brief in Support of its Petition for a Writ of Certiorari[1] to review the Judgment and Opinion of the

[1] Sky Chefs filed its Petition for Writ of Certiorari on January 17, 1991.

United States of Court of Appeals for the Ninth Circuit entered on November 27, 1990.

STATEMENT OF THE CASE

Petitioner raised two primary issues in its Petition for Writ of Certiorari: (1) whether Respondent's discriminatory use of her peremptory challenges violated Petitioner's right to equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution,[2] and (2) whether the imposition of punitive damages violated Petitioner's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution.[3]

Two recent decisions by this Court, not available at the time Sky Chefs filed its Petition for Writ of Certiorari, are germane to these issues.

REASONS FOR GRANTING THE WRIT

A. Sky Chefs Has Standing to Raise the Equal Protection Rights of the Excluded Jurors

Sky Chefs' Petition for a Writ of Certiorari fully addressed the right of Sky Chefs to raise the equal protection rights of a male supervisor for whose actions Sky

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[2] U. S. CONST. amend V; U. S. CONST. amend XIV.

[3] Id.

Chefs was held liable.[4] This Court's recent decision in *Powers v. Ohio*, ___ U.S. ___ (April 1, 1991 WESTLAW 41528),[5] supports the proposition that Sky Chefs also has third-party standing to raise the equal protection rights of the males discriminatorily excluded from the jury by Respondent.

In *Powers*, this Court held that a white criminal defendant had standing to raise the equal protection rights of black jurors excluded from jury service because of their race through the use of peremptory challenges by the prosecution. This Court stated:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an 'injury-in-fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, *Singleton*, supra, at 112; the litigant must have a close relation to the third party, id. at 113-114; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Id.* at 115-116.

Powers, 1991 WESTLAW at 7. Just as the Petitioner in *Powers* satisfied these criteria, so does Sky Chefs. The discriminatory use of peremptory challenges causes a defendant cognizable injury, and the defendant, therefore, has a concrete interest in challenging the practice. *Id.*

The concrete injury suffered by, and the concrete interest to, a defendant challenging discriminatory

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[4] Petition for Writ of Certiorari at 8-16.

[5] All references to the text of this opinion are to the pages set forth in the printed version provided by WESTLAW.

peremptory challenges on behalf of the excluded jurors arises because "discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a . . . proceeding in doubt." *Id. quoting Rose v. Mitchell*, 443 U.S. 545, 556 (1979).[6] The relationship between the defendant and the excluded jurors, according to this Court in *Powers*, "is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases." *Id.* at 8 *citing Griswold v. Connecticut*, 381 U.S. 479 (1965); *Craig v. Boren*, 429 U.S. 190 (1977); *United States Dept. of Labor v. Triplett*, 493 U.S. ___, 110 S.Ct. 1428 (1990).

This Court also held that jurors are severely limited in their ability to protect their own rights and, that as a practical matter, it is difficult and, accordingly, rare for excluded jurors to personally challenge their discriminatory exclusion. *Id.* at 9-10. The difficulties confronting the excluded jurors are no less daunting in the present case. It follows, therefore, that the right to assert the equal protection rights of excluded jurors recognized in *Powers* should be afforded to Petitioner in this action.

The United States Court of Appeals for the Ninth Circuit rejected Sky Chefs' equal protection claim, in part, on standing grounds, reasoning, "black criminal defendants have . . . enjoyed the right to object to the use of

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[6] *Powers* involved the use of racially discriminatory peremptory challenges in a criminal proceeding. Sky Chefs' Petition addresses the necessity of extending the prohibition against the discriminatory use of peremptory challenges to challenges based on gender in a civil action. Petition for Writ of Certiorari at 16-23.

peremptory challenges against members of their own race, under the equal protection clause of the Fourteenth Amendment. . . . *This right is based on ethnic group membership rather than status as a criminal defendant . . .*"[7] *Powers* establishes that the right to object to purposeful discrimination in the use of peremptory challenges is *not* based on ethnic group membership but rather *is* based on the injury to, interest of, and unique status of a defendant to protect the rights of excluded jurors.

Sky Chefs' Petition addressed the third-party standing of a corporation to assert the equal protection rights of a male supervisor for whose actions it has been held liable under the doctrine of respondeat superior.[8] For those reasons and for the reasons set forth in this Supplemental Brief, Sky Chefs' Petition should be granted.

B. The Imposition of Punitive Damages Violated Sky Chefs' Due Process Rights

The jury in the U. S. District Court for the District of Oregon found that Sky Chefs was responsible, and liable, for the improper actions of its former general manager[9] and, awarded Respondent one-half million dollars in punitive damages. Sky Chefs' due process rights were violated when adequate guidance was not provided to

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[7] Petition for Writ of Certiorari, Appendix A at 24a-25a (citation omitted and emphasis added).

[8] Petition for Writ of Certiorari at 8-11.

[9] It was undisputed that Sky Chefs took immediate action against its general manager when it learned of his creation of a hostile sexual work environment.

the jury in determining whether to impose punitive damages and, if so, in what amount. Moreover, there was no meaningful or adequate review of the propriety of the award of punitive damages by the District Court or the U. S. Court of Appeals for the Ninth Circuit.

The recently decided case of *Pacific Mutual Life Ins. Co. v. Haslip*[10] is instructive. In that case, an Alabama jury assessed over one million dollars in punitive damages against Pacific Mutual. This Court, in response to Pacific Mutual's contesting the constitutionality of the imposition of punitive damages, held that an award of punitive damages is not *per se*, unconstitutional. However, in upholding the constitutionality of the award of punitive damages, this Court stated:

> We need not, and indeed we cannot, draw a mathematical line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court where the case is tried to a jury properly enters into the constitutional calculus.[11]

Although no bright line test was established, this Court determined that three factors must be met in order for an award of punitive damages to withstand constitutional challenge. First, the jury instruction must be reviewed to determine whether it sufficiently limits jury discretion and " . . . enlightens the jury as to the punitive damages' nature and purpose . . . "[12] Second, there must

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[10] ___U.S.___, 111 S.Ct. 1032 (1991).

[11] Id. at 1043.

[12] Id. at 1044.

be specific post-trial procedures for " . . . scrutinizing punitive awards."[13] Third, an appellate court must provide

> . . . an additional check on the jury's or trial court's discretion. . . . In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." . . . This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.[14]

Here, the jury instruction was similar to the instruction approved by this Court in *Pacific Mutual*. However, there were no post-trial procedures for review of the award.

The District Court's only response to the extensive post-trial motions of Petitioner in this case was a terse denial. The District Court failed to utilize the proper procedures for evaluating the propriety of the punitive damage award as required by this Court in *Pacific Mutual*.[15]

Likewise, there was no appellate review which applied any substantive standards for evaluating the punitive damage award, or to determine whether the

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[13] Id. at 1044-1045. The Court noted with approval the post-trial procedures and factors to be reviewed in evaluating an award of punitive damages enunciated by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986).

[14] Id. at 1045 (citations omitted).

[15] 111 S.Ct. 1032 (1991).

award was " . . . reasonable in its amount or, rational in light of their [punitive damages] purpose to punish what has occurred and to deter its repetition."[16] To the contrary, the United States Court of Appeals for the Ninth Circuit cited with approval the case of *Hall v. May Dept. Stores Co.*[17], quoting: " . . . this tort leaves little room to scrutinize the facts for an additional degree of aggravation to support punitive damages."[18] In essence, the Court of Appeals took the position that if you prove the tort, you therefore prove entitlement to punitive damages.

The failure of the District Court and the Court of Appeals to properly review and evaluate the award of punitive damages resulted in a violation of Sky Chefs' due process rights as guaranteed by the Constitution.

CONCLUSION

For the reasons set forth in its Petition for Writ of Certiorari, as well as in this Supplemental Brief to the Petition for Writ of Certiorari, it is clear that Sky Chefs has standing to challenge the discriminatory exclusions of males from the jury as a constitutional violation.

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[16] 111 S.Ct. at 1045.

[17] 637 P.2d 126 (Or. 1981).

[18] Petition for Writ of Certiorari, 19a-20a.

There was inadequate, if any, post-trial review of the award of punitive damages by the District Court. Moreover, the Court of Appeals also failed to meaningfully evaluate the award. Therefore, Sky Chefs was denied due process of law in the imposition of punitive damages.

For these reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

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